Supreme Court, U.S.
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No. 01-1642

In the

Supreme Court of the United States

AZTECA ENTERPRISES, INC.,

Petitioner,

v.

DALLAS AREA RAPID TRANSIT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT DALLAS AREA RAPID TRANSIT

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QUESTIONS PRESENTED

1. Whether this Court should deny Plaintiff-Petitioner's writ of certiorari because there is no conflict between the Fifth Circuit decision holding that Plaintiff-Petitioner lacked standing to bring suit under Title VI (42 U.S.C. §2000d and the Ninth Circuit's decision in *Fobbs v. Holy Cross Health System Corporation*, 29 F.3rd 1429 (9th Cir. 1994) *cert denied*, 513 U.S. 1127, 115 S.Ct. 936, 130 L.Ed.2d 881 (1995)?

2. Whether the district court properly dismissed and the circuit court properly affirmed the dismissal of Plaintiff-Petitioner's Title VI (42 U.S.C. §2000d) claim because it lacked standing?

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STATEMENT OF THE CASE

On February 9, 1999, Petitioner Azteca Enterprises Inc. ("Azteca") filed its Original Petition and Application for a Temporary Injunction against Respondent Dallas Area Rapid Transit ("DART") in the 44th District Court in Dallas, Dallas County, Texas, disputing the award of a concrete crosstie contract to another bidder. DART removed the case to the United States District Court for the Northern District of Texas on the same day. On February 23, 1999, the district court filed its Memorandum Opinion and Order denying Azteca's attempt to enjoin the DART Board of Directors from awarding the concrete crosstie contract to another bidder. (App. 18a-23a and App. 11a).

On August 4, 1999, the district court granted DART's Motion to Dismiss, filed pursuant to Fed.R.Civ.P. 12(b)(6), dismissing Azteca's claims under 42 U.S.C. §§ 1983 and 1981, the Texas Constitution, and for punitive damages. (App. 17a and App. 11a). The court, however, denied DART's Motion to Dismiss Azteca's Title VI claim. (App. 17a and App. 11a).

On November 15, 1999, DART filed its Motion for Summary Judgment, pursuant to Fed.R.Civ.P. 56(b), challenging both Azteca's standing to bring suit under Title VI and the merits of the claim. On September 15, 2000, Magistrate Judge Sanderson submitted his Report and Recommendation recommending that the district court grant DART's Motion for Summary Judgment on Azteca's Title VI claim on the ground that Azteca had no standing to bring a claim for damages under Title VI. (App. 10a-16a). On January 16, 2001, the district court adopted the findings, conclusions and recommendations of the Magistrate Judge and granted DART's Motion for Summary Judgment. In so doing, the Court noted that Azteca had improperly tendered evidence in its objections to the Magistrate's findings and recommendations, but that the Court had reviewed such evidence in making its findings, and determined that the evidence was hearsay and conclusory. (App. 7a-9a).

Azteca filed its Notice of Appeal on February 9, 2001. Without hearing oral argument, the Court of Appeals for the Fifth Circuit issued an unpublished Summary Calendar opinion reversing and remanding the district court's

judgment granting DART's 12(b)(6) Motion to Dismiss Azteca's claims under 42 U.S.C. §§ 1983 and 1981, the Texas Constitution, and for punitive damages, and affirming the district court's judgment on DART's Motion for Summary Judgment on Azteca's Title VI claim. Azteca did not file a Petition for Rehearing.

REASONS FOR DENYING THE WRIT

This Court should not review the decision of the Fifth Circuit Court of Appeals in the present case because it correctly affirmed the district court's dismissal of Azteca's Title VI (42 U.S.C. §2000d) claim based upon lack of standing. The Fifth Circuit properly determined that Azteca has no standing to sue under Title VI because it failed to prove that it was an intended beneficiary of, an applicant for, or a participant in DART's federally funded transportation program. Azteca's disagreement with both the Fifth Circuit's and the district court's findings is insufficient to warrant review by this Court.

I.
THE FIFTH CIRCUIT DECISION BELOW IS NOT IN CONFLICT WITH THE NINTH CIRCUIT'S DECISION IN *FOBBS VS. HOLY CROSS HEALTH SYSTEM CORPORATION* OR ANY OTHER CIRCUIT

The Fifth Circuit determined that Azteca lacked standing to sue under Title VI because Azteca failed to prove that it was an intended beneficiary of, an applicant for, or a participant in DART's federally funded transportation program.[1] Azteca claims that this decision is in conflict with the Ninth Circuit's decision in *Fobbs v. Holy Cross Health Service Corporation*, 29 F.3d 1429 (9th Cir. 1994) cert. denied, 513 U.S. 1127, 115 S.Ct. 936, 130 L.Ed.2d 881 (1995), which held there is no requirement that the plaintiff plead that he was an intended beneficiary of the federally-funded program in which defendants are alleged to have participated. *See Fobbs*, 29 F.3d at 1447. This case is not concerned with the sufficiency of Azteca's pleadings. Contrary to Azteca's

contentions, there is no confusion among circuits[2] regarding what is required to sustain a cause of action under Title VI.

Title VI of the Civil Rights Act of 1964 (42 U.S.C. §2000d) states:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

The Fifth Circuit relied, in part[3], on the seminal decision in *Simpson v. Reynolds Metals Co.*, 629 F.2d 1226 (7th Cir. 1980) in affirming the judgment of the lower court that Azteca had no standing to sue under Title VI. (App. 3a). Credited largely with developing the "Intended Beneficiary Doctrine", the Seventh Circuit identified the true essence of Title VI's standing requirement, which is a "logical nexus" between the federally funded program or activity and the person who is entitled to sue. *See Simpson*, 629 F.2d at 1235.

The "logical nexus" identified by the *Simpson* Court requires that a plaintiff "**be** an intended beneficiary or, an applicant for, or a participant in a federally funded program." *Id.* (emphasis added) This well-established requirement[4] is vital to a plaintiff's ability to assert and sustain a Title VI cause of action. Azteca cites to *Fobbs* for its authority that there is a split between the Fifth and Ninth Circuits regarding pleading requirements under Title VI. Although Azteca correctly notes that Title VI grants some persons a private cause of action, its conclusion that it has standing to bring an action under Title VI is incorrect.

For Title VI purposes, the *Fobbs* opinion, at most, stands for the proposition that failure to plead intended beneficiary status in a federally funded program is not fatal to surviving a Motion to Dismiss for failure to state a claim under Title VI. *Fobbs*, 29 F.3d at 1447. Irrespective of the alleged disunity in the courts regarding pleading requirements under Title VI, all of the circuits, including the *Fobbs* Court, require that one prove that it is the intended beneficiary to recover under Title VI. *Cf. Fobbs*, 29 F.3d at

1447 (Although the plaintiff must prove intended beneficiary status at trial, it need not be pled in the complaint); *See also Wrenn v. State of Kansas*, 561 F.Supp. 1216, 12121 (D.Kan.1983)(court held that there was no requirement that the plaintiff plead that he was an intended beneficiary, but acknowledged that "[p]laintiff eventually must prove this fact."); *Scelsa v. City University of New York*, 806 F.Supp. 1126, 1140 (S.D.N.Y.1992) (In order to establish standing to sue under Title VI plaintiff must be the intended beneficiary of a federal spending program; while such fact need not be pleaded, it must eventually be proven in order for plaintiff to recover); *Grimes v. Superior Home Health Care of Middle Tennessee, Inc.*, 929 F.Supp. 1088, 1092 (M.D.Tenn.1996). Thus, the legal question here involves proof of ability to sustain a cause of action under Title VI, not sufficiency of the pleadings.

Azteca's reliance on the *Fobbs* case to demonstrate disunity between the Ninth and Fifth Circuits fails for other reasons as well. First, the *Fobbs* case is questionable legal authority as compared to the treatment of this issue across circuits.[5] More importantly, unlike this case, the *Fobbs* Court reviewed a dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).[6] *Cf. Fobbs*, 29 F.3rd at 1447 *with Jackson*, 951 F.Supp. at 1298 (a plaintiff must be an intended beneficiary of, applicant for, or participant in a federally funded program to have standing to assert a claim under Title VI). In response to DART's Motion for Summary Judgment, Azteca failed to produce sufficient evidence that it is an intended beneficiary of, an applicant for, or a participant in DART's program. Azteca's misguided reliance on the *Fobbs* opinion to demonstrate disunity among the circuits, or that the lower courts were in error in the application of the law, misses the point.

Assuming arguendo and without concession that there is a split among the circuits on the question of Title VI's standing requirement, this is not the case to decide what the law is or should be. First, this case has been remanded to the district court for further proceedings on Azteca's claims under 42 U.S.C. §§ 1983 and 1981, the Texas Constitution, and for punitive damages. Even if the Court believed there was a

split in the circuits, it should defer consideration of the issue for development of a more complete record. Second, disuniformity among the circuits may be tolerable. Disagreement in the lower courts facilitates the independent evaluation of factual and legal issues by different courts.

II.
THE DISTRICT COURT PROPERLY DISMISSED, AND THE FIFTH CIRCUIT PROPERLY AFFIRMED THE DISMISSAL OF, THE TITLE VI CLAIM

The lower courts correctly considered DART's Motion for Summary Judgment, including summary judgment evidence, on Azteca's Title VI claim and appropriately applied established legal precedent to find that Azteca had no standing to bring a claim for damages under Title VI. Petitions for a writ of certiorari are rarely granted when the asserted error consists of erroneous factual findings. *See* Sup.Ct.R. 10. As the non-movant in response to DART's Motion for Summary Judgment, Azteca failed to carry its burden to establish a material issue of fact that it was ever an applicant, participant, or beneficiary in any federally funded program carried out by DART.

Azteca inartfully contends that it became an applicant and a participant under Title VI when it was "invited to bid on DART's [contract] Solicitation" or, alternatively, during its past interactions with DART prior to the Solicitation. Neither of these contentions is sufficient to create a "logical nexus" between Azteca's "participation" and DART's "federally funded program". *See Simpson*, 629 F.2d at 1235; *See also United States v. Harris Methodist Fort Worth*, 970 F.2d 94, 98 (5th Cir. 1992). Azteca's argument that the exclusion of evidence[7] by the lower court (so-called "plain error") warrants certiorari cannot be sustained where the district court's order expressly states that it considered the evidence.

Azteca's argument that "all DBE's are meant to be beneficiaries" under Title VI protection is also insufficient justification to grant the petition. The *Simpson* Court noted that "[t]he legislative history of Title VI also lends strong support to the conclusion that **Congress did not intend to**

extend protection under Title VI to any person other than an intended beneficiary of federal financial assistance." *Simpson*, 629 F.2d at 1235 (citing 110 Cong. Rec. 1518-21) (emphasis added). Thus, for the purposes of Title VI, DART's bus, train, paratransit, and HOV passengers are the intended beneficiaries of DART's federal funds. *See Miller v. Phelan*, 845 F.Supp. 1201, 1207 (N.D. Ill. 1993) ("the most likely beneficiaries of the [Cook County Regional Transportation Authority] are the riders"). *See also Jackson*, 951 F.Supp. at 1298 (S.D. Tex. 1996) (the intended beneficiaries of the federal funds provided to the school district were the students, not their parents, under Title VI); *Harris Methodist Fort Worth*, 970 F.2d at 98 (not every vendor of supplies or services to [an entity] that receives federal funds is a 'participant' in [that entity's] operations protected by §601). This Court should not grant the petition in this case because the Fifth Circuit decision, which forms the basis of this appeal, is a correct application of existing law. Therefore, this Court should not review the lower courts' decisions in this case.

This Court should view Azteca's claim that "all DBE's are meant to be beneficiaries" of Title VI's protection with caution. For the purposes of standing under Title VI, a company's DBE status should not, on its face, be the deciding factor for entitlement to sue under the Act. Courts across all circuits have tended to interpret the meaning of "intended beneficiary" narrowly, and they are correct in doing so. An expansive view of intended beneficiary status is troubling and could lead to discriminatory results[8]. Azteca's strained logic would confer beneficiary status on anyone who attempts to contract with a recipient of federal funds. This Court should not disturb the consistent approach currently employed by the circuits.

CONCLUSION

For these reasons, Respondent respectfully requests the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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[1] The Fifth Circuit's review of the district court's decision was based upon the well settled principle that the court must "review the [summary judgment] evidence and inferences to be drawn therefrom in the light most favorable to the non-moving party" as well as applicable case law. *See* Fed.R.Civ.P. 56(c). Thus, the issue decided by the Fifth Circuit concerned Azteca's ability to assert and sustain a cause of action under Title VI. Azteca has improperly framed its Petition for a Writ of Certiorari on the issue of what is required to adequately plead a cause of action under Title VI. Better stated, Azteca's Petition, and its reliance on the *Fobbs* opinion, is focused on the issue of what is required to survive a Motion to Dismiss for failure to plead a cause of action under Title VI. In its Petition, Azteca wholly fails to identify, much less raise, an appropriate issue for

consideration by this Court. As a result, DART objects to Azteca's Specific Legal Reasons For Granting The Writ on the grounds that the issue of pleadings requirements is not an issue in this case, that the *Fobbs* opinion does not control the basis for the Fifth Circuit's decision in this case, and that there is no disunity among the circuit courts concerning the issue of what is required to assert and sustain a cause of action under Title VI.

[2] Azteca has failed to provide sufficient information concerning the manner in which all of the other circuit courts have treated the *Fobbs* decision to justify its claim of disunity among circuit courts for the purposes of sustaining a Petition for Writ of Certiorari. DART reurges its objection to Azteca's Specific Legal Reasons For Granting The Writ on the grounds that Azteca has wholly failed to identify and raise an appropriate issue for consideration by this Court, that the issue of pleadings requirements is not an issue in this case, that the *Fobbs* opinion does not control the basis for the Fifth Circuit's decision in this case, and that there is no disunity among the circuit courts on the dispositive issue at hand.

[3] In its Summary Calendar opinion, the Fifth Circuit cites to *Jackson v. Katy Indep. School Dist.*, 951 F.Supp. 1293, 1298 (S.D. Tex. 1996) for the principle that a plaintiff must be an "intended beneficiary of, an applicant for, or a participant in a federally funded program." The *Jackson* case, a Texas federal district court case, cites and follows the *Simpson* case, a Seventh Circuit case, for the same principle.

[4] The standing requirement handed down by the *Simpson* Court is widely cited and applied across circuits in cases involving both dismissal for failure to plead facts necessary to maintain juridictional standing and failure to prove the standing requirement under Title VI. *See Griggs v. Lexington Police Department*, 672 F.Supp. 36, 39 (D.Mass. 1987); *United States v. Harris Methodist Fort Worth*, 970 F.2d 94, 98 (5th Cir. 1992); *Miller v. Phelan*, 845 F.Supp. 1201, 1207 (N.D. Ill. 1993); *Jackson v. Katy Indep. School Dist.*, 951 F.Supp. 1293, 1298 (S.D. Tex. 1996); *E.E.O.C. v. Southwestern Baptist Theological Seminary*, 485 F.Supp. 255, 261 (N.D. Tex. 1980); *Drayden v. Needville Indep. School Dist.*, 642 F.2d 129, 132-33 (5th Cir. 1981); *Doe on behalf of Doe v. St. Joseph's Hosp. of Fort Wayne*, 788 F.2d 411. 418-19 (7th Cir. 1986); *Scelsa v. City Univ. of New York*, 806 F.Supp. 1126, 1140 (S.D.N.Y. 1992); *Carmi v. Metropolitan St. Louis Sewer Dist.*, 620 F.2d 672, 674 (8th Cir. 1980).

[5] The *Fobbs* case has been overruled by *Daviton v. Columbia/HCA Healthcare Corp.*, 241 F.3d 1131, 1133 (9th Cir. (Cal) 2001) on the issue of the application of the equitable tolling requirement.

[6] Although a small minority of courts have held that a Title VI claim should not be dismissed for failure to plead intended beneficiary status, these cases have no bearing on whether Azteca actually is an intended beneficiary for the purpose of asserting or sustaining a Title VI claim.

[7] Azteca improperly tendered evidence in its objections to the Report and Recommendations of the Magistrate Judge. Nevertheless, the district court, upon review of the evidence, determined that the so-called evidence did not cure the standing deficiency because it did not establish anything more than Azteca's prior unsupported conclusion that it was a "participant." (App. 7a).

[8] In response to concern voiced during debates on the Civil Rights Act of 1964 that Title VI would allow government intervention into every aspect of the operations of recipients of federal financial assistance, Representative Celler stated:

> "This title simply provides that, where Federal money is used to support any program or activity . . . ***the program must be used for the benefit of both races, without discrimination***. The bill would require that each federal agency which extends financial assistance of the type covered by Title VI must establish nondiscriminatory standards of general application.

See Simpson, 629 F.2d at 1243 (fn 17, citing 110 Cong. Rec. 1518-21) (emphasis added).